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Summary record of the 2158th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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procedure for the appointment of judges and the identification of the entity responsible for conducting the prosecution would depend on the answer to the question whether the court would be an organ of the United Nations and that question was linked to that of the revision of the Charter of the United Nations, an issue which had so far been regarded as very problematical. If the court was a United Nations organ, all Member States of the United Nations would be parties to the statute and the judges would be appointed in the same way as those of the International Court of Justice. Since there could be no certainty that such a solution would be adopted, it would be advisable to consider an alternative whereby the judges would be elected only by the States parties to the statute of the court.

104. The problem of submission of cases to the court was not insurmountable. There again, the solution depended on the court's position *vis-à-vis* the United Nations. If it was an organ of the United Nations, versions A and C (*ibid.*, para. 88) would be the most appropriate. If not, several alternatives, all precluding United Nations participation, would be possible. One would be, for example, to set up a prosecuting attorney's office in the form of a college of judges representing all legal systems, which might be attached permanently to the court and which would also conduct investigations. The solution that would be most in keeping with the nature of crimes under international law was obviously to provide that any State party to the statute of the court could institute proceedings. Account also had to be taken of the danger of political abuse, but such abuse would be neutralized by the court itself as an international body which would be responsible in the final analysis for deciding whether or not to try a particular case.

105. The question of penalties was much more complex than it seemed at first sight. The code should, of course, specify the penalties attaching to each crime, as did national codes. But which scale was to be chosen? How could the various approaches taken in 160-odd penal codes be brought into line with one another? And who would choose between them—the Commission, the Sixth Committee of the General Assembly or some other body? Moreover, most of the international crimes referred to in the code were not covered by national legislations. Establishing a scale of penalties was desirable, of course, but it was hard to see how it could be done: should it range from the minimum provided for in one penal code to the maximum provided for in another? All those questions were still outstanding.

106. There were also many other problems still to be solved, but a solution would be possible only when agreement had been reached on the fundamental issues relating to the establishment of an international criminal court.

The meeting rose at 1.10 p.m.

2158th MEETING

Wednesday, 16 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Jurisdictional immunities of States and their property (A/CN.4/415,[1] A/CN.4/422 and Add.1,[2] A/CN.4/431,[3] A/CN.4/L.443, sect. E)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING

1. The CHAIRMAN invited the Special Rapporteur to introduce his third report on the topic (A/CN.4/431), in which he again reviewed the whole set of draft articles on jurisdictional immunities of States and their property provisionally adopted by the Commission on first reading at its thirty-eighth session, in 1986,[4] which read as follows:

PART I

INTRODUCTION

Article 1. Scope of the present articles

The present articles apply to the immunity of one State and its property from the jurisdiction of the courts of another State.

Article 2. Use of terms

1. For the purposes of the present articles:

(*a*) "court" means any organ of a State, however named, entitled to exercise judicial functions;

(*b*) "commercial contract" means:

(i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;

(iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

[1] Reproduced in *Yearbook ... 1988*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[4] *Yearbook ... 1986*, vol. II (Part Two), pp. 8 *et seq.*

Article 3. Interpretative provisions

1. The expression "State" as used in the present articles is to be understood as comprehending:

(*a*) the State and its various organs of government;

(*b*) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

(*c*) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

(*d*) representatives of the State acting in that capacity.

2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract.

Article 4. Privileges and immunities not affected by the present articles

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State in relation to the exercise of the functions of:

(*a*) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and

(*b*) persons connected with them.

2. The present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State *ratione personae*.

Article 5. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which jurisdictional immunities of States and their property are subject under international law independently of the present articles, the articles shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the said articles for the States concerned.

PART II

GENERAL PRINCIPLES

Article 6. State immunity

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles [and the relevant rules of general international law].

Article 7. Modalities for giving effect to State immunity

1. A State shall give effect to State immunity under article 6 by refraining from exercising jurisdiction in a proceeding before its courts against another State.

2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the property, rights, interests or activities of that other State.

3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its political subdivisions or agencies or instrumentalities in respect of an act performed in the exercise of sovereign authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

Article 8. Express consent to the exercise of jurisdiction

A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

(*a*) by international agreement;

(*b*) in a written contract; or

(*c*) by a declaration before the court in a specific case.

Article 9. Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(*a*) itself instituted that proceeding; or

(*b*) intervened in that proceeding or taken any other step relating to the merits thereof.

2. Paragraph 1 (*b*) above does not apply to any intervention or step taken for the sole purpose of:

(*a*) invoking immunity; or

(*b*) asserting a right or interest in property at issue in the proceeding.

3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.

Article 10. Counter-claims

1. A State cannot invoke immunity from jurisdiction in a proceeding instituted by itself before a court of another State in respect of any counter-claim against the State arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of any counter-claim against the State arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of the principal claim.

PART III

[LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY

Article 11. Commercial contracts

1. If a State enters into a commercial contract with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.

2. Paragraph 1 does not apply:

(*a*) in the case of a commercial contract concluded between States or on a Government-to-Government basis;

(*b*) if the parties to the commercial contract have otherwise expressly agreed.

Article 12. Contracts of employment

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

2. Paragraph 1 does not apply if:

(*a*) the employee has been recruited to perform services associated with the exercise of governmental authority;

(*b*) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual;

(*c*) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

(*d*) the employee is a national of the employer State at the time the proceeding is instituted;

(*e*) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Article 13. Personal injuries and damage to property

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to compensation for

death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred in whole or in part in the territory of the State of the forum and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 14. Ownership, possession and use of property

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

(*a*) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or

(*b*) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or

(*c*) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or

(*d*) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding up; or

(*e*) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it against a person other than a State, notwithstanding the fact that the proceeding relates to, or is designed to deprive the State of, property:

(*a*) which is in the possession or control of the State; or

(*b*) in which the State claims a right or interest,

if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right or interest claimed by the State is neither admitted nor supported by *prima facie* evidence.

Article 15. Patents, trade marks and intellectual or industrial property

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to:

(*a*) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other similar form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(*b*) an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph (*a*) above which belongs to a third person and is protected in the State of the forum.

Article 16. Fiscal matters

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to the fiscal obligations for which it may be liable under the law of the State of the forum, such as duties, taxes or other similar charges.

Article 17. Participation in companies or other collective bodies

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(*a*) has participants other than States or international organizations; and

(*b*) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body in question.

Article 18. State-owned or State-operated ships engaged in commercial service

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor to other ships owned or operated by a State and used or intended for use in government non-commercial service.

3. For the purposes of this article, the expression "proceeding relating to the operation of that ship" shall mean, *inter alia*, any proceeding involving the determination of:

(*a*) a claim in respect of collision or other accidents of navigation;

(*b*) a claim in respect of assistance, salvage and general average;

(*c*) a claim in respect of repairs, supplies, or other contracts relating to the ship.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor to any cargo belonging to a State and used or intended for use in government non-commercial service.

6. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

7. If in any proceeding there arises a question relating to the government and non-commercial character of the ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship or cargo.

Article 19. Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(*a*) the validity or interpretation of the arbitration agreement;

(*b*) the arbitration procedure;

(*c*) the setting aside of the award,

unless the arbitration agreement otherwise provides.

Article 20. Cases of nationalization

The provisions of the present articles shall not prejudge any question that may arise in regard to extraterritorial effects of measures of nationalization taken by a State with regard to property, movable or immovable, industrial or intellectual.

PART IV

STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT

Article 21. State immunity from measures of constraint

A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of constraint, including any measure of attachment, arrest and execution, on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] unless the property:

(*a*) is specifically in use or intended for use by the State for commercial [non-governmental] purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed; or

(*b*) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding.

Article 22. Consent to measures of constraint

1. A State cannot invoke immunity, in connection with a proceeding before a court of another State, from measures of constraint on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] if and to the extent that it has expressly consented to the taking of such measures in respect of that property, as indicated:

(*a*) by international agreement;

(*b*) in a written contract; or

(*c*) by a declaration before the court in a specific case.

2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under part IV of the present articles, for which separate consent shall be necessary.

Article 23. Specific categories of property

1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial [non-governmental] purposes under subparagraph (*a*) of article 21:

(*a*) property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(*b*) property of a military character or used or intended for use for military purposes;

(*c*) property of the central bank or other monetary authority of the State which is in the territory of another State;

(*d*) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale;

(*e*) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State, unless the State in question has allocated or earmarked that property within the meaning of subparagraph (*b*) of article 21, or has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under article 22.

PART V

MISCELLANEOUS PROVISIONS

Article 24. Service of process

1. Service of process by any writ or other document instituting a proceeding against a State shall be effected:

(*a*) in accordance with any special arrangement for service between the claimant and the State concerned; or

(*b*) failing such arrangement, in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(*c*) failing such arrangement or convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(*d*) failing the foregoing, and if permitted by the law of the State of the forum and the law of the State concerned:

(i) by transmission by registered mail addressed to the head of the Ministry of Foreign Affairs of the State concerned requiring a signed receipt; or

(ii) by any other means.

2. Service of process by the means referred to in paragraph 1 (*c*) and (*d*) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Article 25. Default judgment

1. No default judgment shall be rendered against a State except on proof of compliance with paragraphs 1 and 3 of article 24 and the expiry of a period of time of not less than three months from the date on which the service of the writ or other document instituting a proceeding has been effected or is deemed to have been effected in accordance with paragraphs 1 and 2 of article 24.

2. A copy of any default judgment rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in paragraph 1 of article 24 and any time-limit for applying to have a default judgment set aside, which shall be not less than three months from the date on which the copy of the judgment is received or is deemed to have been received by the State concerned, shall begin to run from that date.

Article 26. Immunity from measures of coercion

A State enjoys immunity, in connection with a proceeding before a court of another State, from any measure of coercion requiring it to perform or to refrain from performing a specific act on pain of suffering a monetary penalty.

Article 27. Procedural immunities

1. Any failure or refusal by a State to produce any document or disclose any other information for the purposes of a proceeding before a court of another State shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State is not required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

Article 28. Non-discrimination

1. The provisions of the present articles shall be applied on a non-discriminatory basis as between the States Parties thereto.

2. However, discrimination shall not be regarded as taking place:

(*a*) where the State of the forum applies any of the provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned;

(*b*) where by agreement States extend to each other treatment different from that which is required by the provisions of the present articles.

2. Mr. OGISO (Special Rapporteur) recalled that, at its previous session, the Commission had decided to refer articles 1 to 11 to the Drafting Committee for their second reading, together with the new articles 6 *bis* and 11 *bis* which he had proposed, and to continue consideration of the remaining articles 12 to 28 in the plenary Commission at the present session.[5] Although he had already reviewed the whole set of draft articles provisionally adopted on first reading in his preliminary report (A/CN.4/415) and second report (A/CN.4/422 and Add.1), in the light of the comments and observations on those articles received from Governments,[6] he was submitting his third report (A/CN.4/431) with a view to assisting the work of the Drafting Committee as well as the Commission's further deliberations.

3. The part of the third report concerning articles 1 to 11 *bis* was intended mainly for the use of the Drafting Committee and the part relating to the remaining

[5] *Yearbook ... 1989*, vol. II (Part Two), p. 98, para. 405.

[6] *Yearbook ... 1988*, vol. II (Part One), p. 45, document A/CN.4/410 and Add.1-5.

articles 12 to 28 for consideration in the plenary Commission. However, since some of the changes he recommended for articles 1 to 11 *bis* could relate to matters of substance, he proposed to touch on those articles first, although they were currently being considered in the Drafting Committee.

4. With regard to the proposed new text of article 2, which combined articles 2 and 3 as adopted on first reading, he wished to draw attention to four points. First, as to the definition of the term "State" in paragraph 1 (*b*), some members of the Commission had expressed the view that a constituent unit of a federal State should be regarded as a State. Although the provision concerning political subdivisions of the State (para. 1 (*b*) (ii)) was intended to include federal constituents entitled to perform acts in the exercise of sovereign authority, he was submitting an additional text (para. 1 (*b*) (i *bis*)), for consideration by the Drafting Committee.

5. Secondly, with regard to the "agencies or instrumentalities of the State" referred to in paragraph 1 (*b*) (iii), the view had been expressed in the Sixth Committee of the General Assembly, as well as in the Commission, that State enterprises should be excluded from that category of entities. Although opposing views had also been expressed, he was proposing an addition at the end of paragraph 1 (*b*) (iii) to the effect that any entity established by the State for the purpose of performing commercial transactions (State enterprise), which had an independent legal personality and was capable of suing or being sued, should be excluded from that category of entities. The new paragraph 1 (*b*) (iii) was related to the substance of draft article 11 *bis* and should therefore be read in conjunction with that article.

6. Thirdly, with regard to paragraph 1 (*c*), he was proposing, in the light of the views expressed in the Sixth Committee and in the Commission, that the expression "commercial contract" be replaced by "commercial transaction", with consequential changes in articles 11, 11 *bis* and 19. The proposed change did not entail any modification of the content of the definition itself.

7. Fourthly, with regard to paragraph 2, a number of Governments favoured the primacy of the criterion of the nature of the transaction, while others considered that the same weight should be given to both the "nature" and "purpose" tests. The text adopted on first reading (art. 3, para. 2) had not fully satisfied all members of the Commission and he was therefore suggesting another compromise proposal, to the effect that, while the primary criterion for determining immunity should be the nature of the transaction, a court of the forum State should be free to take into account the governmental purpose of the transaction.

8. Turning to part II of the draft (General principles), he was proposing the deletion of the bracketed phrase "and the relevant rules of general international law" from article 6 in view of the opposition expressed on various grounds by many members. However, provision should be made for the further development of State practice and international law and, in paragraph (2) of his comments on article 6, he repeated the suggestion made in his preliminary report that, should the present articles become a convention, the following paragraph should be included in the preamble:

> "*Affirming* that the rules of general international law continue to govern questions not expressly regulated in this Convention".

9. His proposals regarding articles 8 to 10 were technical in nature, and he would refrain from entering into detail about them at the present juncture, but would be pleased to answer any questions.

10. With regard to the title of part III of the draft, he would be interested to hear any reactions to a neutral formulation such as "Activities of States to which immunity does not apply" or "Cases in which State immunity may not be invoked before a court of another State". The latter formulation had been suggested by a member of the Commission, and it would be helpful to the Drafting Committee to learn the views of other members.

11. No further changes were proposed for article 11,[7] except for the consequential ones resulting from the suggested replacement of the expression "commercial contract" by "commercial transaction" (see para. 6 above).

12. Draft article 11 *bis* had been reformulated to take account of the views expressed at the previous session. The new text made it clear that a State enterprise engaging in a commercial transaction with a foreign natural or juridical person was subject to the same rules and liabilities as were applicable to a natural or juridical person in a forum State, provided that the enterprise satisfied the conditions set out in paragraph 1 (*b*) (iii) of the proposed new article 2. In that case, the State was to be regarded as an entirely separate entity in respect of the commercial transaction of such an enterprise and, if it was sued by the foreign natural or juridical person, the State could invoke immunity from the jurisdiction of the court of the forum State. However, if a State enterprise engaged in a commercial transaction on behalf of the State, or executed a particular commercial transaction as the *alter ego* of the State, such a transaction could be regarded as one between the State and a foreign natural or juridical person, and the provisions of article 11 would then apply.

13. To conclude his comments on the articles which were before the Drafting Committee, he wished to point out that, pursuant to the suggestion made by one Government in its written comments, the expressions "State", "another State" and "other State" had been replaced by "forum State" or "foreign State", as appropriate, in articles 7, 8 and 9. He trusted that the Drafting Committee would consider whether similar changes were desirable in other articles and make appropriate recommendations to the Commission, perhaps on a case-by-case basis.

14. Article 12 presupposed a situation in which an employer State concluded a contract of employment for services or work to be performed in the forum State.

[7] An amended text for paragraph 1 was proposed by the Special Rapporteur in his preliminary report (A/CN.4/415, para. 121).

The text adopted on first reading appeared to apply the principle of non-immunity to the employer State in paragraph 1, while providing for five exceptions to that principle in paragraph 2 (*a*) to (*e*). Since those exceptions were of a most substantial nature, the principle of non-immunity of the employer State was not as extensive as it appeared to be at first glance. The question arose whether the exceptions were so far-reaching as practically to negate the non-immunity principle applicable to the employer State, a principle which he assumed to be generally acceptable. Accordingly, in his preliminary report, he had made two proposals which would have the effect of narrowing the scope of the exceptions, namely deletion of the reference to social security provisions in paragraph 1, and deletion of subparagraphs (*a*) and (*b*) of paragraph 2.

15. The first of those proposals had been made in the light of the point made by some members that not all forum States would have social security provisions. As for the second proposal, the problem with paragraph 2 (*a*) was that it had the effect of excluding administrative or technical staff of a diplomatic mission or consular post from the application of paragraph 1. He was not sure whether the provisions of article 4, paragraph 1, secured immunity for a State employing administrative or technical staff, and he would therefore be interested in hearing members' views on the two alternatives for paragraph 2 (*a*) submitted in his third report. The main problem with paragraph 2 (*b*) was the reference to recruitment. In cases where local labour laws included requirements concerning non-discrimination in recruitment, the forum State might have an overriding interest in alleged violations of such regulations being tried before a local court. It had been suggested both in the Commission and in the Sixth Committee that the word "recruitment" might be replaced by "appointment".

16. With regard to article 13, he had made three proposals in his preliminary and second reports, as reflected in paragraph (2) of his comments on the article in his third report. In view of the discussion on those proposals at the previous session, he now wished to return to the text adopted on first reading, and also to ascertain whether the concept of non-commercial tort itself was acceptable to the Commission. Before completing the second reading, the Commission would have to consider carefully whether or not it wished to retain article 13 and the underlying concept. Members' views on that point would be appreciated.

17. Taking into account the views expressed in the Commission and in the written comments of some Governments, he was suggesting that the Commission consider the advisability of deleting subparagraphs (*c*), (*d*) and (*e*) of paragraph 1 of article 14, which represented mainly the practice of common-law countries. Most members who had spoken on the issue at the previous session had been in favour of such deletion.

18. In response to a request by one Government in its written comments, he was proposing the insertion in subparagraph (*a*) of article 15 of a reference to "a plant breeder's right". He was also proposing the addition of a reference to "a right in computer-generated works".

19. No questions of substance had been raised regarding articles 16 and 17 and he proposed that the texts adopted on first reading be retained, with some minor drafting changes. The proposal by one Government to reformulate article 16 along the lines of article 29 (*c*) of the 1972 European Convention on State Immunity should be referred to the Drafting Committee.

20. He had given detailed explanations concerning article 18 in his second report (A/CN.4/422 and Add.1, paras. 24-31) and was now recommending only the deletation of the bracketed term "non-governmental" in paragraphs 1 and 4, since it rendered the meaning ambiguous and might represent a departure from the practice followed in a number of maritime conventions and in treaties on the law of the sea. He had cited the relevant treaty provisions in his third report (A/CN.4/431, footnotes 22 to 25). As to the suggestion to introduce the concept of segregated State property, it was necessary to avoid duplication, in particular with draft article 11 *bis*. If the ships concerned belonged to a State enterprise, they would be subject under that article to the same rules and liabilities as were applicable to natural or juridical persons.

21. He would welcome the views of members on three points concerning article 19. The first concerned the choice between the expressions "commercial contract" —or rather "commercial transaction" (see para. 6 above)—and "civil or commercial matter" in the introductory clause. He preferred the second formula, since there was no reason to limit the supervisory jurisdiction of a court of the forum State to commercial transactions; the scope of an arbitration depended primarily on the terms of the arbitration agreement and in fact there had been a number of arbitration cases arising out of civil or commercial matters. The second point related to the suggestion made by one Government to add a reference in subparagraph (*c*) to proceedings relating to the "recognition and enforcement" of the arbitral award. He himself was simply suggesting adding a new subparagraph to read: "(*d*) the recognition of the award", since the question of measures of constraint, which included enforcement, was dealt with in part IV of the draft. Thirdly, in the last part of the introductory clause, the choice was between the phrases "before a court of another State which is otherwise competent" and "a court of another State on the territory or according to the law of which the arbitration has taken or will take place". The Commission had adopted the first of those formulas, but the second might have some merit and further consideration should be given to the matter.

22. Article 20 had emerged from the first reading as a general reservation clause. He agreed with many members of the Commission that the article should be deleted.

23. Turning to part IV of the draft, dealing with State immunity in respect of property from measures of constraint, his comments on articles 21 to 23 mentioned that, owing to the independent development of the subjects of immunity from measures of constraint and immunity from jurisdiction, there was still a division of opinion regarding immunity from measures of con-

straint, even among the industrialized countries inclined towards restricted immunity from jurisdiction. According to one view, the power to proceed to measures of constraint was a consequence of the power to exercise jurisdiction; but the opposing view held that international law prohibited forced execution on the property of a foreign State situated in a forum State, even where a court of the forum State had jurisdiction to adjudicate over the dispute. The former view had been upheld by the courts of Switzerland, the Netherlands and the Federal Republic of Germany, and the recent tendency among industrialized countries was to restrict State immunity in respect of property from measures of constraint. Examples of that trend could be cited in recent legislation in the United Kingdom, South Africa, Singapore, Pakistan and Australia. Under that system, provision was made for the enforcement of a judgment or an arbitral award in respect of State property which was for the time being in use, or intended to be used, for commercial purposes. Recent legislation in the United States of America, while setting forth the general rule of immunity from execution, provided for a number of exceptions to the effect that property used for a commercial activity in the United States was subject to execution.

24. In the circumstances, he was proposing alternative texts for articles 21 to 23. The first alternative consisted of the texts adopted on first reading and the second was a reformulation of those texts. It would seem that carefully limited measures of constraint, rather than total prohibition, stood a better chance of obtaining general approval.

25. With regard to the first alternative, the bracketed phrase in the introductory clause of article 21 and in paragraph 1 of article 22, "or property in which it has a legally protected interest", would be deleted. The phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed", in article 21 (*a*), would also be deleted. Thirdly, he suggested deleting the bracketed term "non-governmental" in article 21 (*a*) and in paragraph 1 of article 23. In addition, it would be useful to add the words "and used for monetary purposes" at the end of paragraph 1 (*c*) of article 23.

26. The second alternative for articles 21 to 23 took into account the suggestion that articles 21 and 22 as adopted on first reading should be combined. Paragraph 1 of the reformulated article 21 stated the principle of non-execution against the property of a foreign State in the territory of a forum State, a statement that was followed by a number of exceptions set out in subparagraphs (*a*) to (*c*), which were largely the same as those contained in the adopted texts of article 21 and article 22, paragraph 1.

27. He was, however, suggesting three major changes to the texts of those exceptions as adopted on first reading. First, a reference to arbitration agreements had been introduced in paragraph 1 (*a*) (i) of the reformulated article 21. Secondly, the exception in paragraph 1 (*a*) (iii) had been reworded in line with the similar change in paragraph 1 (*c*) of the new article 8. Thirdly, the words "the property is in the territory of the forum State and" had been added at the beginning of paragraph 1 (*c*). Also in paragraph 1 (*c*), he recommended that the word "State" should be replaced by the words "foreign State".

28. Article 22 basically reproduced the text of article 23 as adopted on first reading. Article 23 in the second alternative was a new provision. Draft article 11 *bis* already provided that a State enterprise was subject to the same rules and liabilities as were applicable to a natural or juridical person. Accordingly, a State enterprise was also subject to the same rules and liabilities as a natural or juridical person in respect of measures of constraint. Logically, therefore, a State could not invoke immunity from measures of constraint before a court of the forum State in respect of such State property as it had entrusted to a State enterprise.

29. Part V of the draft contained miscellaneous provisions, and the first article was article 24, which was generally acceptable to members of the Commission. Some had none the less suggested deleting the words "if necessary" in paragraph 3. In view of the practical problems that would result for the authority serving process, it might be useful to add at the end of that paragraph the phrase "or at least by a translation into one of the official languages of the United Nations", which he had placed between square brackets in the new text proposed as a basis for consideration.

30. In article 25, he was suggesting the addition at the end of paragraph 1 of the words "and if the court has jurisdiction in accordance with the present articles". As to the words "if necessary" in paragraph 2, the same solution could be adopted as for paragraph 3 of article 24.

31. Despite the doubts expressed by some Governments, he recommended retaining at the present stage the text of article 26 adopted on first reading.

32. As to article 27, he had already proposed in his preliminary report the insertion of the words "which is a defendant in a proceeding before a court of another State" after the word "State" at the beginning of paragraph 2, a proposal that had met with support both in the Commission and in the Sixth Committee. He would none the less welcome more comments from members of the Commission.

33. Lastly, as to whether or not article 28 should be retained, the matter required careful consideration after general agreement had been reached on the preceding articles. He would therefore prefer to retain the article in its present form, at least for the time being.

34. The CHAIRMAN, speaking as a member of the Commission, said that he had already made article-by-article comments on the Special Rapporteur's preliminary and second reports at the previous session. His position remained substantially unchanged, and he would simply state his basic position on the revised articles of parts III, IV and V of the draft proposed in the third report (A/CN.4/431).

35. The Special Rapporteur suggested a compromise formula, namely "Activities of States to which immunity does not apply", for the title of part III. He

himself would propose another compromise formula: "Activities of States in respect of which States agree not to invoke immunity". For the purpose of keeping exceptions to immunity at a minimum, article 12 (Contracts of employment), article 13 (Personal injuries and damage to property), article 16 (Fiscal matters) and article 20 (Cases of nationalization) should be deleted.

36. As to article 14, he could accept the Special Rapporteur's proposal to delete paragraph 1 (*c*) to (*e*), but felt that paragraph 1 (*b*) should also be eliminated. The Special Rapporteur's suggestion to include a reference to "a plant breeder's right and a right in computer-generated works" in subparagraph (*a*) of article 15 posed no problem.

37. In part IV of the draft, on immunity from measures of constraint, the new article 21 should be explicit and leave no doubt about the principle of such immunity. He had suggested a formulation at the previous session, but would study further the Special Rapporteur's recommendations for the article. He would none the less stress the importance of retaining the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed", in subparagraph (*a*). Deleting it could prove to be irritating for inter-State relations, especially in the event of execution of a default judgment.

38. While he had no objection to inserting the words "and used for monetary purposes" in paragraph 1 (*c*) of the proposed new article 22, his previous position in favour of deleting paragraph 2 (para. 2 of article 23 as adopted on first reading) remained unchanged.

39. Lastly, the text of article 27, paragraph 2, as adopted on first reading was appropriate and should stay the same. Comity among nations meant that the non-requirement of security should not be limited to defendant States.

40. Mr. TOMUSCHAT, thanking the Special Rapporteur for his clear and concise third report (A/CN.4/431), said that the drafting proposals made therein were a considerable improvement on the texts adopted on first reading.

41. Commenting specifically on articles 22 to 28, he said that he approved of the proposed merger of articles 21 and 22 into a new article 21, and in particular of the opening clause in paragraph 1, which was a streamlined version of article 21 as adopted. The Special Rapporteur had rightly focused on property of a foreign State as the sole object deserving protection. It would be absurd to grant to third parties complete protection from measures of constraint simply because a foreign State had an interest in the property concerned. However, a provision could perhaps be added to the effect that any rights enjoyed by a foreign State in relation to property owned by a third party would not be affected by measures of constraint against that third party.

42. He endorsed in particular paragraph 1 (*c*) of the proposed new article 21. To require a connection with the object of the claim was a condition which could never be met in the most common categories of cases—financial claims. In that regard, he disagreed with Mr. Shi. For instance, if a bank sought repayment of a loan it had made to a foreign State, what would be the property that had a "connection" with the object of the claim? An attempt could, of course, be made to trace the monies concerned, but money had, as it were, an abstract value and it was not always easy to determine on what it had been expended. Such a requirement was therefore basically unfair, as it would obstruct any attempt to recover loans a debtor failed to refund to his creditor.

43. He had some doubts about the need for the proposed new article 23. In his view, a State enterprise established for commercial purposes was not covered by the general definition of the State. It might well be an instrument of the State, but it was not entitled to perform acts pursuant to the governmental powers of the State and it thus fell outside the scope of the topic of jurisdictional immunities of States. The new article 23 should therefore be deleted.

44. With regard to article 24, close examination was required of the rule whereby service of process would be validly effected only if the document instituting proceedings was accompanied by a translation into the official language of the foreign State concerned. Assuming, for instance, that a French firm had concluded a contract under French civil law with a State-run body in the Lao People's Democratic Republic or Cambodia, should it be a requirement that a translation into the Lao or Cambodian language must be provided? Where the proper law of the contract had been expressly agreed between the parties, the language of that law should be deemed to suffice. While he welcomed the Special Rapporteur's suggestion that at least a translation into one of the official languages of the United Nations might be required, he nevertheless considered that there should be a reasonable link between the system of law in question and the official language used. The use of Chinese in western Europe, for instance, would not be reasonable. He trusted that a balanced solution could be found and, in that connection, the solutions arrived at in other international conventions might provide a useful model.

45. He held strong views on article 25 and would go even further than the Special Rapporteur's suggested amendment to paragraph 1. In a number of instances, foreign States had been the victims of default judgments because they had not entered an appearance, placing their trust in the rule of sovereign immunity. That rule had not, however, shielded them from such a judgment because, under the procedural laws of the countries concerned, a defendant had to appear in court and expressly plead lack of jurisdiction. In that connection, he would remind members of the dispute between the United States of America and China concerning bonds issued by the Imperial Government of China in 1911.[8] Such a procedural requirement was totally unsatisfactory. Sovereign immunity, whether applied as a rule of customary law or under the present

[8] *Jackson* v. *People's Republic of China*, United States Court of Appeals for the Eleventh Circuit, judgment of 25 July 1986 (*Federal Reporter, 2d Series*, vol. 794 (1986), p. 1490).

articles, was an objective limitation on a State's jurisdictional powers. A State could not be compelled to enter an appearance if it was clear from the outset that the claim affected the exercise of governmental powers. That, of course, could prove extremely expensive—and even disastrous for a small country—in terms of the legal fees incurred in the foreign State by a State wishing to defend its interests. An unambiguous provision should therefore be incorporated in a separate paragraph to make it incumbent upon the judge to inquire *ex officio* into the issue of immunity under the present articles.

46. The drafting of article 26 was not at all satisfactory, for it was open to two possible interpretations. According to the first, the article would exclude the possibility of issuing any order or injunction against a State carrying the proviso that non-compliance would entail a monetary penalty. Did that mean that an order or injunction *per se* was prohibited? If so, he did not think that such a strict limitation of judicial powers would be advisable. According to the second interpretation, only the imposition of a monetary penalty on a State would be prohibited. In either case, there was room for improvement and the existing text should not be adopted without modification.

47. He agreed with the Special Rapporteur's proposed amendment to article 27 and with his suggestion to retain article 28 in its present form for the time being.

48. Lastly, he trusted that the Commission would complete the second reading of the draft articles during the term of office of its current members. To that end, it should bear in mind how little time remained to attain that objective.

Draft Code of Crimes against the Peace and Security of Mankind[9] (*continued*) (A/CN.4/419 and Add.1,[10] A/CN.4/429 and Add.1-4,[11] A/CN.4/430 and Add.1,[12] A/CN.4/L.443, sect. B)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 15, 16, 17, X AND Y[13] *and*

PROVISIONS ON THE STATUTE OF AN INTERNATIONAL CRIMINAL COURT (*continued*)

49. Mr. THIAM (Special Rapporteur), replying to points raised during the debate, thanked members of the Commission for their valuable contributions on a difficult topic—difficult because it stood at the crossroads of law and politics and, being concerned with the progressive development of international law, necessarily involved a meeting of several trends of thought.

50. He wished at the outset to point out that international criminal law (*droit international pénal*) was now very much a branch of international law, a fact that the Commission must recognize. In French law at least, *droit international pénal*, which was taught at university as a separate discipline and was concerned with the study of international crimes, had to be distinguished from *droit pénal international*, which was concerned with conflicts of jurisdiction in criminal matters. It had become increasingly evident, ever since the Nürnberg Trial, that more and more crimes, including *apartheid*, genocide and aggression, were crimes not of internal law but of international law. For that reason he had found it difficult as Special Rapporteur to group according to any one school of thought the various statements made during the discussion.

51. It had never been his intention to define the term "perpetrator", for the Commission had gone beyond that stage. In any event, it was a matter that could be dealt with in the Drafting Committee. The fact that a number of criminal codes, including the French, German and Finnish, did not define the term "perpetrator" had not prevented the courts of the countries in question from functioning properly. In his view, it was for case-law to settle the meaning of that term. As he had explained in his eighth report (A/CN.4/430 and Add.1), its original meaning had been a person who committed a crime, directly and physically. Although an attempt had been made to enlarge the concept to cover, for instance, indirect perpetrators, such persons were not perpetrators in the strict sense of the term, but rather accomplices.

52. The question of determining the link between the act and the perpetrator, and also the categories of perpetrator to be covered, should likewise be settled by case-law. Aggression, for instance, like all crimes against the peace and security of mankind, was a crime committed by those who held power, and its perpetrators were therefore to be found only among those who were vested with a power of command and who used that power to commit such a crime. That provided a possible link. It could also be said that the person responsible was the individual who used the power—or governmental instrument—which vested him with the authority he exercised in order to commit his crime. The Commission's concern, however, was to provide for the criminal responsibility of natural persons—as opposed to that of the State—who acted as executants. War crimes could, of course, be committed by executants, for example by a soldier on the battlefield who used prohibited means of warfare to commit a crime against the peace and security of mankind or by an officer who ill-treated prisoners of war. For each category of crime it was none the less necessary to ascertain those persons who, by virtue of their functions or activities, were likely to commit the crime in question, and that was essentially a matter of case-law. The Drafting Committee could always discuss the matter further, but he feared that the Commission might then become involved in pointless research.

[9] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

[10] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[11] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[12] *Ibid.*

[13] For the texts, see 2150th meeting, para. 14, and 2157th meeting, paras. 23-36.

53. As to the crimes of complicity, conspiracy and attempt, one general criticism voiced during the discussion was that they should have been dealt with in the general provisions of the draft code, rather than in the specific provisions. Some national criminal codes did deal with complicity, conspiracy and attempt under the general provisions, but many others did not. The French Penal Code, for its part, dealt with complicity in the specific provisions but with attempt in the general provisions. In his view, therefore, it was a matter of methodology and the Commission could adopt either course. He would have no objection to the Drafting Committee handling the matter in the way it saw fit.

54. He had been asked to deal with each crime on a case-by-case basis, determining whether the concepts of complicity, conspiracy and attempt were applicable to all crimes against the peace and security of mankind. It was an impossible task which, despite much good will, he felt quite unable to perform. The Commission must have faith in the judges, who followed case-law in deciding whether or not to apply a particular concept. After all, as had rightly been noted, the courts in question reflected all systems of law and the judges had both theoretical and practical knowledge: they therefore merited the Commission's confidence. In his opinion, the Commission should elaborate general provisions, leaving it to the courts to settle the details. It would be extremely unwise to proceed on a case-by-case basis, particularly where crimes of such a massive nature were concerned. Indeed, he might well have been asked not which concept should apply, but rather what the exceptions were. There were, in fact, none: all the crimes covered were crimes committed by groups of individuals.

55. He had not always been able to define the crimes in question very narrowly, since international law was a science based on sources such as customary law and therefore one could not always be specific. He had, however, done his best in the context of the onus of work placed on him. For instance, with regard to complicity, he had incorporated the ideas of physical and intellectual acts of complicity, although on reflection he should perhaps have used the word "abstract" rather than "intellectual". Thus assistance or aid rendered to the principal perpetrator would be an identifiable physical act, whereas advice, instigation, promises, threats or provocation would be abstract acts—though ascertainable in certain cases. Complicity was, of course, a very complex concept and had been the subject of much discussion by learned writers. None the less, the Commission must still endeavour to present matters as clearly as possible. The concept could, in his view, be incorporated equally well in the general or specific provisions or, alternatively, in both, as was the case with certain national criminal codes, some of which also provided, for instance, that the penalty imposed on an accomplice should be as severe as that imposed on the principal. A discussion of such ideas would, however, be never-ending and his aim therefore had simply been to attempt a clarification.

56. Conspiracy differed from complicity in that, in the case of conspiracy, there was no distinction between direct and indirect perpetrators, between perpetrators and co-perpetrators, and between perpetrators and accomplices, all the participants joining in an agreed plan and deciding jointly on the commission of the crime. Although the Nürnberg Tribunal had decided not to apply conspiracy to all crimes against the peace and security of mankind, the 1954 draft code had extended the concept to all the offences it covered, a trend that had become more marked in the conventions on genocide, *apartheid*, narcotic drugs and slavery. The concept of conspiracy could thus be said to have acquired recognition in international law and therefore had a place in the code along with the concept of complicity, which was also covered by those conventions.

57. The notion of attempt could be handled in several ways. Most criminal codes sought an element of intent in order to distinguish between punishable and non-punishable attempt and left it to the courts to apply that general principle to specific cases. He had formulated one draft article on that basis, having taken into account the criticisms offered by members of the Commission.

58. Drug trafficking was a typical example of a domestic offence which, as it grew in scope, was becoming increasingly international. Mr. Díaz González (2156th meeting) had been very instructive in tracing the development of the common desire to suppress an offence which had become a common danger. Early in its work on the draft code the Commission had tried to define what offences should be included in it. Many members of the Commission and other experts had been against including drug trafficking. However, the situation had now changed and drug trafficking was viewed almost unanimously as a crime under international law. He had himself changed his own position in the same way and, in 1989, had agreed to draft provisions on international drug trafficking.

59. Drug trafficking was a crime both against peace and against humanity—in the first case because many international conflicts originated in drug trafficking when it jeopardized relations between the State of origin and the State of destination; and, in the second case, because it posed a threat to people's health. He had therefore submitted two separate draft articles. But as the Commission's chosen method was to classify the crimes in the draft code into crimes against peace, war crimes and crimes against humanity, it was difficult to decide where to place the crime of drug trafficking. The difference between the two types of crime represented by drug trafficking was clear: in order to constitute a crime against peace, a crime must jeopardize the international public order and must therefore contain a transboundary element; a crime against humanity, in contrast, did not require a transboundary element but rather an element of large scale, even if confined to a single State. He would therefore prefer to retain two separate articles, but the Drafting Committee would doubtless convey its opinion on that point.

60. The question of an international criminal court was not a new one; many draft proposals had been produced by various individuals and bodies, including the Commission itself. Regrettably, so far it seemed

necessary to wait until a crime sufficiently troubled international public opinion, as in the case of drug trafficking for example, before the cry went up for an international criminal court.

61. The draft provisions he had submitted in part III of his report had no direct link with General Assembly resolution 44/39, for the subject had already been included in his work plan. But, since the horse must come before the cart, he had given priority to the draft code of crimes: there was no point in establishing a court which had no crimes to try. It was, for all that, encouraging to have the General Assembly's endorsement for working on the question of an international criminal court. Aware of the differences of opinion in the Commission, he had taken the "questionnaire-report" approach rather than presenting cut and dried articles.

62. On the question of the competence of the court, he had proceeded on the basis of the criminal responsibility of individuals; the criminal responsibility of States or of legal entities in general, to which some members attached great importance, could be taken up at a later stage. There seemed to be three approaches in the Commission. First, a maximalist approach, which had little support, according to which all international crimes should fall within the court's competence. If that proposition was rejected, the question arose as to what court would be competent to try the excepted international crimes. Secondly, there was a moderately restrictive approach, which commanded the most support, limiting competence to the crimes listed in the code. Thirdly, a very restrictive approach would leave it to individual States to decide which crimes should be brought before the court. He was personally in favour of the second approach, for the Commission, having drafted the code, could hardly argue that the court was not competent to try the crimes listed therein.

63. That brought him to the subject of attribution of jurisdiction. Mr. Bennouna (2154th meeting) had criticized him for not mentioning the provisions of the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction.[14] The reason was that the situation had changed over the intervening 37 years, for in 1953 there had been no draft code. The need for an international criminal court now seemed necessary because of the code itself, and it would be illogical to allow States the right to decide whether to confer jurisdiction on the court. Such an arrangement would also give rise to great difficulties: in the case of a crime committed in several States, for example, it would be necessary to have a series of attributions of jurisdiction.

64. He did not think that the court should have appellate jurisdiction; rather, it should coexist with other jurisdictions. A State might choose to try a case itself or to bring it before the court, but it would be wrong to establish a hierarchy of jurisdictions. It would be better for judges to be appointed not by States parties to the statute of the court, but by the General Assembly, which was the broadest possible forum. Similarly, he opted for specialized prosecuting attorneys rather than for prosecutors appointed by States on an *ad hoc* basis.

65. The question of pre-trial examination was more difficult because of the differences between the two main judicial systems. He preferred pre-trial examination simply because it had been the option chosen, notwithstanding the difficulties, in the 1953 draft statute. He was aware of the opposition of some members of the Commission, and the issue would no doubt be taken up in the proposed working group.

66. With regard to the submission of cases to the court, he recalled that, in introducing his report, he had withdrawn item 1 (*b*) (Necessity or non-necessity of the agreement of other States) of the list of points submitted for consideration (A/CN.4/430 and Add.1, para. 79).

67. On the *non bis in idem* rule, he agreed with the majority of members that the court's decisions should be imposed on the jurisdictions of States. Some members felt that the same did not hold true for the inverse situation, for a State would then be able to try a person whom it viewed with favour, and impose a light penalty, simply to prevent him being tried by the international court. Hence there might be a need for exceptions to the rule.

68. In the matter of penalties, it was hard to know whether the rule *nullum crimen sine lege* should simply be applied. That rule had created many difficulties, especially with respect to the decisions of the Nürnberg Tribunal. Many experts argued that those decisions had not infringed the rule, while others disagreed, illustrating the difficulty of transferring a notion from one judicial system to another. Furthermore, as Mr. Barsegov (2157th meeting) had pointed out, there were so many different penalties provided in the various judicial systems that practical difficulties would inevitably arise. The Commission must proceed cautiously in setting penalties. His report did not discuss the problem of where a penalty should be enforced. He was not, in fact, sure whether it should be in the State where the crime had been committed or in the State where the criminal had been found, or whether some system of extraterritoriality should be established. When the Commission had settled the whole question of penalties it would have made much progress in its work.

69. He was grateful for the criticisms and suggestions offered by his colleagues in the Commission and would take them into account. It was important not to approach the problems overconfidently, for progress could only be slow. The revised draft articles which he had submitted at the previous meeting (paras. 23-26) should now be referred to the Drafting Committee, with which he would, of course, co-operate to the full.

70. The CHAIRMAN thanked the Special Rapporteur for his lucid summing-up of the debate. Now that the discussion was concluded, it was his understanding that members generally considered that a working group should be established with a mandate to draw up a draft response by the Commission to the request made of it by the General Assembly in paragraph 1 of its resolution 44/39 of 4 December 1989. After adop-

[14] See 2150th meeting, footnote 8.

tion by the Commission, the draft response would become part of its report to the General Assembly.

71. He had been informed that the following members of the Commission might make up the working group: Mr. Al-Baharna, Mr. Beesley, Mr. Bennouna, Mr. Díaz González, Mr. Graefrath, Mr. Illueca, Mr. Koroma, Mr. Pawlak, Mr. Sreenivasa Rao and Mr. Roucounas. It had also been suggested, and the Bureau concurred, that the working group should include *ex officio* the Special Rapporteur and the Rapporteur of the Commission. If there were no objections, he would take it that the Commission agreed to establish the working group with the membership he had indicated.

It was so agreed.

72. Mr. KOROMA suggested that, notwithstanding the decision just taken, the Working Group should be open-ended.

It was so agreed.

The meeting rose at 1.10 p.m.

2159th MEETING

Thursday, 17 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/419 and Add.1,[2] A/CN.4/429 and Add.1-4,[3] A/CN.4/430 and Add.1,[4] A/CN.4/L.443, sect. B)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

ARTICLES 15, 16, 17, X AND Y[5] *and*

PROVISIONS ON THE STATUTE OF AN INTERNATIONAL CRIMINAL COURT (*concluded*)

1. Mr. THIAM (Special Rapporteur) said that mass international traffic in narcotic drugs could be regarded both as a crime against peace and as a crime against humanity. In his view, it would be preferable, rather than disturbing the structure of the draft code, to have two separate articles dealing with those two aspects. Accordingly, he submitted the following revised texts of draft articles X and Y:

Article X. Illicit traffic in narcotic drugs: a crime against peace

Any mass traffic in narcotic drugs organized on a large scale in a transboundary context by individuals, whether or not acting in association or private groups, or in the performance of official functions, as public officials, and consisting, *inter alia*, in brokerage, dispatch, international transport, importation or exportation of any narcotic drug or any psychotropic substance constitutes a crime against peace.

Article Y. Illicit traffic in narcotic drugs: a crime against humanity

Any mass traffic in narcotic drugs organized on a large scale, whether in the context of a State or in a transboundary context, by individuals, whether or not acting in association or private groups, or in the performance of official functions, as public officials, and consisting, *inter alia*, in brokerage, dispatch, international transport, importation or exportation of any narcotic drug or any psychotropic substance constitutes a crime against humanity.

2. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer to the Drafting Committee the revised draft articles 15 (Complicity), 16 (Conspiracy) and 17 (Attempt) submitted by the Special Rapporteur at the 2157th meeting (paras. 23-25), as well as the revised draft articles X and Y on illicit traffic in narcotic drugs (para. 1 above).

It was so agreed.[6]

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/415,[7] A/CN.4/422 and Add.1,[8] A/CN.4/431,[9] A/CN.4/L.443, sect. E)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[10] ON SECOND READING (*continued*)

3. Mr. RAZAFINDRALAMBO said that he would comment on the proposals concerning articles 12 to 28 made by the Special Rapporteur in his third report (A/CN.4/431).

4. Article 12 (Contracts of employment) should be retained, since it would provide local employees of

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[4] *Ibid.*

[5] For the texts, see 2150th meeting, para. 14, and 2157th meeting, paras. 23-26.

[6] For consideration of draft article X proposed by the Drafting Committee, see 2197th meeting, paras. 30 *et seq.*

[7] Reproduced in *Yearbook ... 1988*, vol. II (Part One).

[8] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[9] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[10] For the texts, see 2158th meeting, para. 1.